IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7481 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE AKIL KURESHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

CHETAN SOMABHAI PARMAR

Versus

THE DESK OFFICER, GOVT. OF INDIA

Appearance:

1. Special Civil Application No. 7481 of 2004

MR PH PATHAK for Petitioner No. 1

MR JITENDRA MALKAN, learned Sr.Standing Counsel for Respondent No. 1

MR AS VAKIL for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE AKIL KURESHI

Date of decision: 31/08/2004

ORAL JUDGEMENT

Rule. Learned Senior Standing Counsel Shri

Malkan waives service of rule on behalf of respondent No.1 and learned advocate Shri A.S.Vakil waives service of rule on behalf of respondent No.2. At the joint request of the learned advocates appearing for the parties, the petition is taken up for final disposal today.

2. In the present petition, the petitioner has challenged the order dated 29.4.03 passed by the respondent No.1 by which the request of the petitioner to refer the dispute raised by him for adjudication to the Industrial Tribunal/Labour Court was rejected on the ground that "as the applicant has not worked for 240 days continuously in a calendar year, hence the dispute is not maintainable under the I.D.Act." It is the case of the petitioner that he had worked continuously for a period of about four years as badli Peon with the respondent No.2 Bank when his services came to be terminated on 30th December 2001. Upon the failure of conciliation, the Conciliation Officer submitted his failure report to the appropriate Government. The appropriate Government, however, by its impugned order dated 29.4.03 was not inclined to refer the dispute for adjudication for the reasons set out hereinabove.

3. Appearing for the petitioner, learned advocate Shri P.H.Pathak has submitted that the impugned order is illegal and unlawful and the respondent No.1 did not have the power or authority to go into the merits of the demand raised by the petitioner and to refuse to refer the dispute for adjudication. It is his contention that the appropriate Government only has to consider whether an industrial dispute exists or is apprehended and whether the same is required to be referred for adjudication to the appropriate Industrial Tribunal or Labour Court. According to his submission, the respondent No.1 has exceeded its jurisdiction and entered into the question of merits and demerits of the demand and has thereby committed gross illegality.

4. Appearing for respondent No.2, learned advocate Shri A.S.Vakil has sought to support the decision of the respondent No.1. It is his case that the petitioner has not produced any material on record in support of his contention that the petitioner had worked for four years with the respondent No.2 continuously nor has he produced any evidence even to prima facie come to the conclusion that he had worked for 240 days during the relevant period i.e. 12 calendar months prior to the date of termination. He submits that the respondent No.2 Bank had filed a reply before the Government and specifically

denied the suggestion that the petitioner had worked for more than four years. It is specifically averred that the petitioner had worked as badli Peon for a span of just 16 days. It is, therefore, the contention of the learned advocate for the respondent No.2 that the appropriate Government was perfectly justified in refusing to refer the dispute for adjudication since the Government was of the opinion that no industrial dispute exists or is apprehended.

5. In furtherance of his submissions, learned advocate Shri Vakil has submitted that to seek reference is not a matter of right and it is well within the powers of the appropriate Government to examine, at least, prima facie whether the demand raised is justified or the same is perverse. He further submits that the decision of the Government being an administrative decision, the sufficiency of the material on the basis of which such a decision is arrived at is not open to judicial scrutiny. In support of his submission, learned advocate Shri Vakil relies upon a decision of the Hon'ble Supreme Court in the case of Bombay Union of Journalists v. State of Bombay, AIR 1964 SC 1617 wherein the Hon'ble Supreme Court had observed that it would not be possible to accept the plea that the appropriate Government is precluded from considering even prima facie the merits of the dispute when it decides the question as to whether its power to make a reference should be exercised or not. If the claim is patently frivolous or is clearly belated, the appropriate Government may refuse to make a reference. He also relies on the observations made by the Hon'ble Supreme Court in the said decision and submits that the scope of judicial review of an order passed by the appropriate Government under section 10(1) read with section 12(5) of the Industrial Disputes Act would not permit the court to reconsider the material on record as long as the Government has not considered any irrelevant or extraneous material and there is some material available with the Government to come to the conclusion that the dispute is not required to be referred for adjudication and sufficiency of such material is not open to judicial review.

6. Learned advocate Shri Vakil has further placed reliance on a decision of the Hon'ble Supreme Court in the case of Prem Kakar v. State of Haryana, reported in (1976) 3 SCC 433 in which the Hon'ble Supreme Court has observed that only if it appears that the Government took into account any irrelevant or foreign consideration that the Court may in a given case interfere with the decision of the Government. Learned advocate Shri Vakil has also

placed reliance on a decision of the Hon'ble Supreme Court in the case of Workmen v. I.I.T.I. Cycles of India Ltd., 1995 Supp (2) SCC 733 in support of his contention that if the Government after considering all facts finds that it is not necessary to make a reference, it would not be open for the Court to interfere with such a decision.

7. The scope of the powers of the appropriate Government under section 10(1) read with section 12(5) of the Industrial Disputes Act is by now well settled. In a decision in the case of M.P.Irrigation Karamchari Sangh v. State of M.P., AIR 1985 SC 860, the Hon'ble Supreme Court was pleased to make the following observations :-

"7. There may be exceptional cases in which the State Government may, on a proper examination of the demand, come to a conclusion that the demands are either perverse or frivolous and do not merit a reference. Government should be very slow to attempt an examination of the demand with a view to decline reference and Courts will always be vigilant whenever the Government attempts to usurp the powers of the Tribunal for adjudication of valid disputes. To allow the Government to do so would be to render S.10 and S.12(5) of the Industrial Disputes Act nugatory."

8. In the case of Ram Avtar v. State of Haryana, AIR 1985 SC 915, the Hon'ble Supreme Court observed that if the Government performs an administrative act while either making or refusing to make a reference under S.10(1), it cannot delve into the merits of the dispute and take upon itself the determination of lis. It was further observed that such action would certainly be in excess of the power conferred by section 10 of the Act. Section 10 requires the appropriate Government to be satisfied that an industrial dispute exists or is apprehended. This may permit the appropriate Government to determine prima facie whether an industrial dispute exists or the claim is frivolous or bogus. If the administrative determination is based on grounds irrelevant, extraneous or not germane to the exercise of power, it is liable to be questioned in exercise of power of judicial review. In the said case, when the State Government refused to refer a dispute regarding the termination of a workman on the ground that the enquiry was consistent with the rules and the standing orders and it was fair and just and there was unbiased determination and the punishment was commensurate with the gravity of the misconduct, the Hon'ble Supreme Court interfered with

the decision of the Government and called for reconsideration.

9. In a decision reported in AIR 1989 SC 1565 (Telco Convoy Drivers Mazdoor Sangh v. State of Bihar), the Hon'ble Supreme Court once again observed that while exercising powers under section 10(1) of the Industrial Disputes Act, the function of the appropriate Government is an administrative function and in performing the administrative function, the Government cannot delve into the merits of the dispute and take upon itself the determination of the lis which would certainly be in excess of the power conferred on it by section 10 of the Act.

10. In a decision reported in the case of Sharad Kumar v. Govt. of NCT of Delhi, AIR 2002 SC 1724, where the appropriate Government had declined to refer the dispute relating to the termination of service by taking note of the designation of the post held by the employee and coming to the conclusion that Area Sales Manager does not fall within the definition of the term 'workman', the Hon'ble Supreme Court observed that the determination of the question requires examination of factual matters for which, materials including oral evidence will have to be considered and in such a matter, the State Government could not arrogate on to itself the power to adjudicate on the question and hold that the appellant-employee was not a 'workman' within the meaning of section 2(s) of the Industrial Disputes Act, thereby terminating the proceedings prematurely and such a matter should be decided by the Industrial Tribunal or the Labour Court on the basis of materials to be placed before it by the parties.

11. Considering the above settled legal position and applying to the facts of the present case, one finds that the petitioner had made an application to the appropriate Government contending that he had worked for four years before his services were terminated. In response to this application, respondent No.2 Bank had filed reply controverting the averments made by the petitioner in the application dated 16.5.02. Admittedly, neither the petitioner nor the respondents had produced any documentary evidence in support of their respective claims regarding the number of days having worked by the petitioner. In response to the reply filed by the respondent No.2 Bank, the petitioner had filed rejoinder and in the rejoinder, the petitioner had called upon the respondent No.2 to produce the muster roll, wage register, salary vouchers, seniority list, names of

juniors and the date of their appointments. The names of juniors were also mentioned in the rejoinder. Admittedly, no documents were produced nor any further reply is filed by the respondent No.2 stating the reasons for non-production of the documents.

12. In view of this admitted facts, was it possible for the appropriate Government i.e. respondent No.1 to come to the conclusion that the petitioner has not worked continuously for a period of 240 days and that therefore the reference sought to be raised by the petitioner should not be referred for adjudication ? It is true that when controverted, it is the duty of the workman to produce cogent evidence showing that he had worked for 240 days during the relevant period. But such an obligation can be discharged in number of ways and no straight jacket formula can be laid down. Was it possible for the Government at the stage of deciding whether the reference is to be made or not, to hold and conclude that the petitioner has failed to establish that he has worked for 240 days ? Was the Government not entering into the determination of lis between the parties and terminated the dispute prematurely by refusing to refer the dispute for adjudication ? In view of the fact that the petitioner had come with specific averments that he had worked continuously for more than four years and in view of the fact that in the rejoinder, the petitioner had specifically called upon the respondent No.2 Bank to produce all the relevant materials, it was not possible for the respondent No.1 to come to the conclusion that the petitioner had not worked for 240 days continuously in a calendar year. The said question could have been decided only by the appropriate Industrial Tribunal or the Labour Court upon the evidence that may be led by the parties. There is also misconception about the requirement of having worked for 240 days. The reason stated for refusing to refer the dispute is that the petitioner has not worked for 240 days continuously in a calender year. Where is the requirement of having continuously worked for 240 days ? In conclusion, I find that the respondent No.1 had exceeded its jurisdiction and exercised powers not vested in it. The question whether the petitioner had actually worked for 240 days during the relevant period or not, in the facts of the present case, was required to be decided by the appropriate Industrial Tribunal or the Labour Court and it was not open for respondent No.1 to come to conclusion for which there was no material on record. Even if the respondent No.1 has not taken into account any irrelevant or extraneous material, in view of the fact that there was no material whatsoever to enable the

respondent No.1 to come to the conclusion that the petitioner had not worked for 240 days during the relevant period, I find that this is a fit case in which this Court should interfere with the order of the respondent No.1 and issue appropriate writ directing the respondent No.1 to reconsider the decision in light of the observations made in this order.

13. In the result, the petition succeeds. The impugned order dated 29.4.2004 passed by the respondent No.1 is set aside and the respondent No.1 is directed to reconsider the question of necessity to refer the industrial dispute raised by the petitioner to the appropriate Labour Court/Industrial Tribunal for adjudication in light of the observations made in this judgment. Such exercise may be concluded within a period of eight weeks from the date of receipt of a copy of this order. It will be open for both the parties to produce further materials in support of their contentions before the appropriate Government. Rule is made absolute to the aforesaid extent with no order as to costs.

(Akil Kureshi, J.)
(vjn)